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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 818.

ANNA S. A. GRAF and AUGUST GRAF, individually, and said AUGUST GRAF as Executor of the Estate of George C. Shipman, Deceased, RUTH MARSH, DORIS MARSH, BLANCHE BELLOWS, AMY WILLIAMS KING, T. WRIGHT WILLIAMS and ADELAIDE S. WILLIAMS,

Petitioners,

vs.

CITY OF NEWARK,

Respondent.

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS.

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INDEX.

PAGE

Statement 1

Summary of Argument 4

Argument 4

POINT 1—The matter here involved is not a local matter but rather one of general law which offends the constitution of the United States and impairs the rights of these petitioners thus creating a federal question 4

Conclusion 9

TABLE OF AUTHORITIES CITED.

Cases Cited.

Beidler v. *So. Carolina Tax Commission*, 282 U. S. 1, 51 S. Ct. 54, 55, 75 L. ed. 131 6

Caperton v. *Ballard*, 14 Wall. 238, 241, 20 L. ed. 885. . 4

Chesebro v. *Los Angeles County Flood Control District et al.*, 306 U. S. 459, 59 S. Ct. Reporter 622. . 7

Erie R. R. Co. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817 8

Great Northern Ry. Co. v. *State of Washington*, 300 U. S. 154 6

Johnson Oil Company v. *Oklahoma*, 290 U. S. 158, 54 S. Ct. 152, 78 L. ed. 238 6

Norris v. *Alabama*, 294 U. S. 587, 53 S. Ct. 579, 79 L. ed. 1074 6

Phelps v. *Board of Education of Town of West New York et al.*, 300 U. S. 319 7

STATUTES CITED.

28 U. S. C. A. 344 (Judicial Code 237 as amended). . 4, 5

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Statement.

This reply brief is made necessary and is deemed advisable by the petitioners for the purpose of bringing to the attention of this Honorable Court a most serious misstatement of a very material fact by respondent in the brief filed in opposition to the granting of the Writ of Certiorari in this cause.

On page 2 of said brief, respondent uses the following language:

> "The petitioners commenced their action in the Supreme Court of New Jersey, the case was duly

> tried, all the parties involved were before the Court and the Supreme Court, in construing the habendum clause in connection with the Laws of the State of New Jersey and the State Statutes involved, deemed that no reversionary rights had arisen in favor of the petitioners. (Opinion of Supreme Court of New Jersey R. 7, reported in 124 N. J. Law 312.)
>
> The only issue was and is a question of title to real estate in New Jersey, which question was duly adjudicated by the Courts of the State of New Jersey. The only theory upon which the petitioners seek this Writ is in effect that because the Supreme Court of New Jersey decided and the Court of Errors and Appeals of New Jersey affirmed said decision, that the petitioners had no property rights, they are thereby deprived of their property without just compensation, evidently because they do not agree with the decision of the Court and still think they are entitled to the property."

There would be no controversy between the parties hereto as to the facts as stated by respondent in the above quoted paragraph were it not for the misstatement:

> "* * * and the Supreme Court, in construing the habendum clause in connection with the Laws of the State of New Jersey and the State Statutes involved, deemed that no reversionary rights had arisen in favor of the petitioners."

Respondent cites, as authority for the above quoted statement, the opinion of the New Jersey Supreme Court (R. 7, reported in 124 N. J. L. 312).

Even the most casual reading of the said opinion readily discloses the fact that the above quoted statement of the respondent is incorrect.

Quite the contrary to the claim of respondent, above quoted, the Supreme Court of New Jersey made no ruling concerning the construction or validity of the deed, which

forms the basis of this matter, and the only reference to the habendum clause of said deed in the said opinion is found in the statement of the facts in the case in the last paragraph on page 8 of the record herein, and such statement of facts forms no part of the opinion of the New Jersey Supreme Court except as a preamble thereto; neither has any question as to the construction or validity of the said deed ever been raised in the Courts below or in the stipulation of agreed facts (R. 54 to 62 inclusive).

In total disregard of the agreed facts in this matter (R. 54 to 62) and of the rights of these petitioners under the contract (in the form of a deed), which forms the basis of this proceeding, the Supreme Court held:

> "Certain lands in Newark were conveyed by relators' ancestors to a canal company for canal purposes, and they claim reversionary title thereto by virtue of its subsequent abandonment as a canal conveyance to the State, and subsequent use by the City for general highway purposes. Held, that there has been no change in the use of the lands as a public highway; and therefore there was no reversion.
>
> On Application for a Writ of Mandamus."

This matter is not before this Court upon a question of title to real estate but for the purpose of testing the constitutionality of a law of the State of New Jersey, created by the Court of last resort in that State because the said State thereby passed and is now enforcing a law by which the respondent is permitted to confiscate and under such law actually has taken and confiscated the property of these petitioners.

Summary of Argument.

POINT I.

The matter here involved is not a local matter but rather one of general law which offends the Constitution of the United States and impairs the rights of these petitioners thus creating a federal question.

Argument.

POINT I.

The matter here involved is not a local matter but rather one of general law which offends the Constitution of the United States and impairs the rights of these petitioners thus creating a federal question.

It would be indeed unecessary and an unjustifiable encroachment upon the time and patience of this Court to burden the Justices thereof with a recitation of the provisions of Title 28, section 344, U. S. C. A. (Judicial Code, section 237, as amended.)

To use the ammunition supplied by the respondent, reference is made to the case of *Caperton* v. *Ballard,* 14 Wall. 238, 241, 20 L. ed. 885, in which this Honorable Court said (as quoted by respondent):

> "This Court has repeatedly declared that it is only under the 25th Section of the Judiciary Act (now 237) that it takes cognizance of error committed in the highest Courts of the State. There must be a Federal question, within the terms of that Section, to enable us to review the decision of a State tribunal. Is there such a question here?"

It is hardly necessary to remind this Honorable Court that the section referred to in the above quotation is now Title 28, section 344 U. S. C. A. (Judicial Code, section 237 as amended) or substantially the same.

The Court in that case asked what here amounts to a pertinent question. Is there such a question here?

As pointed out in the main brief, this matter had its inception in a petition for a writ of mandamus which clearly demonstrates that from the very commencement of the action these petitioners have made claim to a vested right. The right claimed is not a right under a statute of the State of New Jersey but is a right under a contract (in the form of a deed) made by the ancestor of the petitioners to the Morris Canal & Banking Company, which, although it was a creature of the State by reason of its incorporation was not otherwise a part of the State of New Jersey.

The judgment brought here for review is a final judgment of the New Jersey Court of Errors and Appeals, the Court of last resort in the State of New Jersey, and the claim of the petitioners as to why this Court has jurisdiction and why this Court should reverse the said judgment, is that the judgment by its terms has deprived these petitioners of vested rights secured to them by Section 10 of Article 1, and the 5th and 14th amendments of the Constitution of these United States of America, and this question of the deprivation of the rights of the petitioners secured to them by that constitution was raised by the petitioners in their appeal to the New Jersey Court of Errors and Appeals from the New Jersey Supreme Court, which brings the matter clearly within the jurisdiction of this Court.

In the case of *Great Northern Ry. Company* v. *State of Washington*, 300 U. S. 154, this Court said (p. 165):

> "Passing the appellant's contention that a federal right may not be denied under the guise of the application of a state rule of evidence, we come to the question whether, when the asserted right has been denied, this Court is concluded by a finding of fact or a mixed finding of fact and law made by the state court. We have repeatedly held that in such case we must examine the evidence to ascertain whether it supports the decision against the claim of federal right."

The Court in that case considered several cases coming out of a state court involving different situations but all tending to show that when the asserted right has been denied, this Court is not concluded by a finding of fact or a mixed finding of law and fact made by the state court, among which we find the following:

Norris v. *Alabama*, 294 U. S. 587, 53 S. Ct. 579, 79 L. ed. 1074;
Beidler v. *So. Carolina Tax Commission*, 282 U. S. 1, 51 S. Ct. 54, 55, 75 L. ed. 131;
Johnson Oil Company v. *Oklahoma*, 290 U. S. 158, 54 S. Ct. 152, 78 L. ed. 238.

After referring to the above cases, this Court said at page 167:

> "Citation of authority for the same principle might be multipled indefinitely."

In this matter the petitioners claim before this Court, as it was before the New Jersey Court of Errors and Appeals, is that their constitutional rights have been invaded because the obligations of a contract have been

impaired, their private property has been taken for a public use without just compensation and they have been deprived of their property without due process of law, thus raising the undoubted question of a federal right and entitling these petitioners to the protection of this Court.

In the case of *Phelps* v. *Board of Education of Town of West New York et al.*, 300 U. S. 319 (which was an application for a writ of certiorari to the New Jersey Court of Errors and Appeals), although the judgment of the lower court was there affirmed, this Court, however, said on page 322:

> "This court is not bound by the decision of a state court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right, we give weight to the construction of the statute by the court of the state * * *."

It is respectfully urged that this matter which had its inception in an application for a writ of mandamus wherein it is claimed that the petitioners have been deprived of property without due process of law, as in the instant case, appropriately draws into question constitutionality of the law under which the petitioners' property is taken, and United States Supreme Court has jurisdiction of an appeal from a judgment denying a writ.

In the case of *Chesebro* v. *Los Angeles County Flood Control District et al.*, 306 U. S. 459, 59 S. Ct. Reporter 622, this Court said on page 462:

> "Petitioners appealed to this court; appellees moved, as to the city, to dismiss or affirm on the ground that no federal question was involved; and, as to both

appellants, on the grounds that no substantial federal question was presented, and that the decision below rests upon adequate non-federal grounds. We dismissed the city's appeal for want of a substantial federal question and postponed to the hearing on the merits further consideration of the question of jurisdiction and of the motion to dismiss or affirm.

That motion is denied. The validity of the statute under the federal constitution was by the petition appropriately drawn in question and in substance the decision of the state supreme court is in favor of its validity. See *People of the State of New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67-69, 49 S. Ct. 61, 63, 73 L. ed. 184, 62 A. L. R. 785."

While it is true that in this case no direct attack has been made by the petitioners against any statute of the State of New Jersey, it is also true that the opinion and judgment of the courts below creates a law which has the same working effect as a statute and is understood to be considered by this court as a law of the state. *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817.

The law of the State of New Jersey created by the judgment of its court of last resort has as effectively deprived these petitioners of their rights as could be done by a statute enacted by the legislature of that state. However, there is by the terms of the petition for certiorari herein a collateral attack upon the statutes of the State of New Jersey upon which the courts below allegedly based their opinions, because it is claimed by these petitioners that if the law established by the courts below by precedent is correct, then the statutes upon which the judgment and opinion of the courts below is allegedly based are unconstitutional and deprive these petitioners of a federal right.

CONCLUSION.

It is, therefore, respectfully urged that a writ of certiorari should issue as prayed for in the petition herein.

Respectfully submitted,

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